SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 822

WILLIAM LYLE BOYLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 17, 1968.

Citations to Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra,* page 2, is reported in 395 F. 2d 413.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 17, 1968 [Clk. Tr. 139]. Rehearing was denied on October 10, 1968 [Clk. Tr. 140]. On November 11, 1968, Justice William O. Douglas extended the time for filing petition for writ of certiorari to and including December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented.

1. When two persons are being investigated for certain criminal activities, and buildings belonging to one of the persons are illegally searched, does the other have standing to preclude introduction of records found therein which incriminate him.
2. Considering the *Linkletter v. Walker*[1] and *Terry v. Ohio*[2] statements of the Court adopting the general police deterrence theory as the premise for the exclusionary rule, should the standing requirements of *Jones v. United States*[3] be re-examined.
3. When a state prosecutor retains evidence and gives it to federal officials in violation of a state court order directing return of that evidence, may the person against whom such evidence is thereafter used in a federal prosecution preclude its introduction on Fourth and Fourteenth Amendment grounds.
4. In light of *Wong Sun v. United States,*[4] has an exploitation of the original illegality occurred when the police confront an accused person with illegally seized evidence for the purpose of inducing him to make an incriminating statement.

Statement of the Case.

Petitioner was indicated by a federal grand jury in the United States District Court on March 16, 1966, for making verified income tax returns which he allegedly knew to be untrue [Clk. Tr. 2-6]. He was con-

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[1]381 U.S. 618.
[2].... U.S. ...., 20 L. Ed. 2d 889.
[3]362 U.S. 257.
[4]371 U.S. 471.

victed on said charges, moved for a new trial and appealed to the United States Court of Appeals for the Ninth Circuit. After affirming the conviction, on the ground that appellant had no standing to object to an illegal search, the Court of Appeals denied a rehearing. The matter is brought before the Supreme Court pursuant to 28 U.S.C., Section 1254(1).

Petitioner, who was manager of the Midway City (Orange County, California) Sanitary District in 1959 and 1960, regularly dealt with and received services from Edwin Barkley and his businesses, the Barkley Pipeline Co. and Mesa Pipeline & Supply, Inc. District Attorney investigators in October, 1961, [Rep. Tr. 163-168, Clk. Tr. 18-19] believed that Barkley and petitioner committed theft by overcharging for services rendered to the Sanitation District, and that part of the moneys paid out by the District was being repaid to petitioner, personally. This belief was based partly on the fact that District Attorney's investigator, John Gier, had observed a copy of a cashier's check from Edwin Barkley payable to W. Lyle Boyle, petitioner and also upon the fact that people and machines for which billings were made were apparently elsewhere at the times indicated on the bills. Stating said beliefs in three assertedly invalid affidavits and search warrants dated October 9, 1961, January 18, 1962, and January 31, 1962, [Clk. Tr. 18-30] investigators searched buildings and offices of Barkley Pipeline Company and Mesa Pipeline & Supply, Inc., finding, among other items, certain cancelled checks [Clk. Tr. 17] which were made payable to the petitioner [Clk. Tr. 11]. On October 11, 1961, two days after issuing the first of three search warrants, pursuing their investigation of petitioner and Barkley,

two investigators summoned petitioner to his superior's office and questioned him about the money he had received from Barkley [Rep. Tr. 61-64 and 163-168]. Apparently the investigators were in possession of certain cancelled checks during said interview since investigator Gier, on that same date signed a return to the search warrant claiming to have certain cancelled checks obtained in the search of October 9, 1961 [Clk. Tr. 16].

After petitioner and Edwin Barkley were arrested and charged in the Orange County (California) Superior Court, a motion to suppress the People's evidence was granted in favor of both defendants, and the charges were dismissed [Clk. Tr. 32]; the court ordered the evidence returned to Edwin Barkley, [Clk. Tr. 36 and 38], but some of the evidence was retained by the District Attorney.

In the District Court after the federal indictment, pursuant to Rule 41(e), petitioner filed a motion to suppress the evidence, clues and testimony which were obtained by the illegal state search; said motion was denied.

Some of the cancelled checks which had been planned for use as evidence by the People in the state court prosecution and retained after dismissal in violation of a court order [Clk. Tr. 13, 32, 33] were thereafter introduced into evidence by the United States Attorney.[5] [Rep. Tr. 27-30].

[5](Referring to Government Exhibits 9, 10, and 11, the Court of Appeals said, "Although the record is not entirely clear, at least some of the checks were offered into evidence by the Gov-

Specifically, Government Exhibits 9, 10, and 11, cancelled checks drawn on the account of Barkley Pipeline Construction Incorporated, payable to the petitioner, as a "Licensed Land Surveyor," were used to support the Government's allegation that petitioner failed to report as income $9,975.47 received in 1959, and $9,472.07 received in 1960 [Rep. Tr. 22-30].

Petitioner, in his defense, claimed that the money received was a loan from Barkley personally, which petitioner was going to use to pay off a loan he had previously received for his house [Rep. Tr. 87-100].

On rebuttal, evidence was introduced that during the repetitive questioning on October 11, 1961, petitioner, who apparently was confronted with certain of the checks, admitted that he had received money from Barkley and was quite sure he had declared these payments on his federal income tax return. He further stated he had probably forgotten them in his state returns. [Rep. Tr. 164-167].

Regarding the facts for standing, the court below stated, "Here, it is very clear that the search and seizure were directed at Barkley, 'someone else', and not at appellant." The court then found that appellant Boyle lacked standing based upon the Ninth Circuit interpretation of *Jones v. United States*, 362 U.S. 257.

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ernment and received over appellant's objection." 395 F. 2d 413, 414. For more detail regarding said evidence, see pages 28-30 of Reporter's Transcripts; affidavits by Albert Albeck [Clk. Tr. 32-33] and Statement of Facts in Appellant's Brief before the United States Court of Appeals, pp. 6-8).

REASONS FOR GRANTING THE WRIT.

Evidence Should Be Excluded as Being the Result of an Illegal Seizure Where the State Prosecutor Illegally Retains Evidence in Violation of a State Court Order Directing Its Return, and Then Gives It to a Federal Prosecutor for His Use.

Illegal retention of the evidence by the District Attorney after the court ordered it returned [Clk. Tr. 36] constituted a separate and distinct unreasonable seizure in violation of the Fourth Amendment. Such a seizure not only victimized Barkley and petitioner, but also the the entire judicial system. The illegal retention flagrantly hindered and obstructed the due processes of the law thus violating the Fourteenth Amendment as well. Though no cases exist on this fact situation, theories expressed in a number of cases must be deemed applicable:

1. If an illegal search and seizure is violative of the Fourth Amendment as spelled out in *Weeks v. United States,* 232 U.S. 383, *Wong Sun v. United States,* 371 U.S. 471, and *Terry v. Ohio,* ..... U.S. ....., 20 L. Ed. 889, then a seizure (retention) in violation of court order must also violate the same cases. At the very least, illegal retention must be declared to be an "exploitation" of the primary illegality condemned in *Wong Sun.*

2. The fundamentally unfair situation which developed because of the prosecution's tactics may be analogous to *Miller v. Pate,* 386 U.S. 1, wherein the prosecutor used evidence which he knew to be false; shorts were covered with paint and he falsely claimed it to be blood. If knowing use of false

evidence violates the Fourteenth Amendment, then knowing use of evidence held in violation of a court order must similarly be violative of the Fourteenth Amendment.

3. In *United States v. Wade,* 388 U.S. 218, reversal appeared to be based on the fact that the suspect could have been prejudiced by unfair police tactics used at the time of the lineup. Prejudice also results when illegally held evidence is used to convict.

Certiorari should be granted for the reason that the court below overlooked this issue. If a proper theory has not been applied, certiorari should be granted to determine the conflict raised by such omission.

The Decision Below Is Incorrect and Conflicts With Existing Supreme Court, Circuit Court of Appeals and State of California Cases on the Subject of Standing to Object to Illegally Seized Evidence.

I.

The decision below conflicts with this Court's decision in *McDonald v. United States,* 335 U.S. 451, wherein a search was held invalid as against McDonald, the person who fell within the traditional concept of standing. His co-defendant, who did not meet the then existing standing requirements, was given standing because he was "prejudiced"; the theory being that if the property had been properly returned to McDonald, it would not have been available for use at the trial. The Court in *McDonald* seemed to feel that the outcome of the co-defendant's case should not be made dependent upon whether or not McDonald was successful in

having his property returned to him, or whether he made any attempt to have it returned. *McDonald v. United States,* 335 U.S. 451; *Rosencranz v. United States,* 334 F. 2d 738, 740 (C.A. 1). The Ninth Circuit's opinion in petitioner's case is incorrect since the *outcome of petitioner's case now rests on the fact that Barkley was unsuccessful in one of the trial courts in having the evidence returned.*[6] Nothing in reason, logic or principle distinguishes the present case from *McDonald.* In fact, petitioner has a stronger case in that the District Attorney flagrantly refused to comply with the Superior Court order to return the evidence.

II.

Certiorari should be granted because the decision below conflicts with a series of Courts of Appeals cases in other circuits following *McDonald v. United States,* 335 U.S. 451:

1. *Nelson v. United States,* 208 F. 2d 505.
2. *Hair v. United States,* 289 F. 2d 894.
3. *Schoeneman v. United States,* 317 F. 2d 173.
4. *Rosencranz v. United States,* 334 F. 2d 738 (C.A. 1).
5. *Gillespie v. United States,* 368 F. 2d 1 (C.A. 8).
6. *Barnett v. United States,* 384 F. 2d 848 (C.A. 5).
7. *United States v. Harris,* 388 F. 2d 373 (C.A. 7).

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[6]Some portions of the record indicate a possible "partial" return by the District Attorney in that photostatic copies appear to have been made of certain pieces of evidence before it was returned. Such evidence is also inadmissible. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 391-392; *Nelson v. United States,* 208 F. 2d 505; *People v. Berger,* 44 Cal. 2d 459.

Of course, it makes no difference that the state, as opposed to the federal government, made the illegal search herein. *Elkins v. United States,* 364 U.S. 206.

The courts in all of said cases concluded that even if the search did not invade the petitioner's personal constitutional rights he is sufficiently prejudiced by introduction of evidence obtained in an illegal search of the co-defendant. The fact that the co-defendant Barkley, was prosecuted in a prior case in the state court involving the same questionable evidence and not in the particular case being prosecuted in District Court should make no difference. To sanction such a distinction would be to allow the Government the opportunity to erase a taint merely by declining to prosecute a co-defendant who has standing to object.

The cases cited are without doubt irreconcilable and in dispute with the petitioner's case in the Ninth Circuit and will remain so until settled by the Supreme Court.

III.

Certiorari should be granted because the decision below conflicts with the principles established in *Cecil Jones v. United States,* 362 U.S. 257, and developed in *Mancusi v. DeForte,* ..... U.S. ....., 20 L. Ed. 2d 1154, and *Bumper v. North Carolina,* ..... U.S. ....., 20 L. Ed. 2d 797. Petitioner herein qualifies as a "person aggrieved by an unlawful search and seizure"; "he has been the victim of a search or seizure, one against whom the search was directed . . ." *Cecil Jones v. United States,* 362 U.S. 257, 261, and thus has standing.

In reviewing *Jones,* an obvious question appears: What meaning is attributed to the phrases "victim of a search or seizure" and "one against whom the search was directed"? Does not this include any person who is the subject of the investigation, even if his property

is not that searched and even if he is not present? Is not his privacy, his right to be let alone, invaded if the search and investigation of *his* activities be made improperly?

Finding that "standing" existed in *Bumper v. North Carolina,* ..... U.S. ....., 20 L. Ed. 2d 797, 802, footnote 11, an important factor for the court was the fact that the police were looking for evidence against the petitioner, though the house searched and the gun seized both belonged to the suspect's grandmother, who was the only one at home during the search. In the first of the three search warrants, which was executed by the Orange County District Attorney, on October 9, 1961, the supporting affidavits clearly state that checks with petitioner's name on them had been observed, thus making petitioner "one against whom the search was directed" [Clk. Tr. 19, 23 and 29]. On October 11, 1961, petitioner was interrogated by the District Attorney's investigators and confronted with checks and records which had been seized [Rep. Tr. 166]. Thus, the opinion below conflicts in logic, principle and fairness with *Bumper* and *Jones.* If the decision below be allowed to stand, a police officer or Internal Revenue agent in the Ninth Circuit can, without fear of losing his case, search the businesses and homes of each and every business associate and co-suspect of a person in order to find evidence against that person.

In *Mancusi v. DeForte,* papers seized, belonged to the union, yet DeForte, an employee, was held to have

standing to object. The place in which they were kept, an office (but not the one assigned to DeForte) was simply a place "in which there was a reasonable expectation of freedom from governmental intrustion." *Mancusi v. DeForte,* ..... U.S. ....., 20 L. Ed. 2d 1154, 1159. Petitioner should reasonably have been able to conclude that Barkley's office and the records of their business transactions should be free from governmental intrusion.

Since the *Mancusi v. DeForte* decision was rendered after the Ninth Circuit decision below, certiorari should be granted to determine what the effect of the new case might be. *Helvering v. Wiese,* 292 U.S. 614.

IV.

Since Petitioner was one of the persons against whom evidence was attempted to be obtained, the search can be viewed as a prejudicial violation of the privacy of his person. *Wong Sun v. United States,* 371 U.S. 471, 492. For instance, in *Roberts v. United States,* .... U.S. ...., 19 L. Ed. 2d 18, standing apparently went unquestioned when an illegal wiretap of conversations between defendant A and his attorney was used as the basis for a remand to the trial court of co-defendant B's case (no indication that B was the subject of a wiretap). On remand the trial court was directed to determine whether B had been prejudiced by the wiretap, making the case sound much like *McDonald v. United States,* 335 U.S. 451. Because of the above described inconsistencies certiorari should be granted.

The Decision Below Is Based Upon a Constitutional Rule of Law Long Outmoded and Long Over Due for Change.

I.

The adoption by the Court of the "police deterrent" rationale for the exclusionary rule logically dictates that a defendant should be able to object to the admission of *any* unconstitutionally seized evidence, whether seized from him or from a third person.

Jones was based on the "privacy" rationale which through various mental gymnastics has been expanded as much as was necessary to achieve desired and just results in cases reaching the Supreme Court. *Mancusi v. DeForte,* .... U.S. .. ., 20 L. Ed. 2d 1154, *Bumper v. North Carolina,* .... U.S. .... 20 L. Ed. 2d 797, 802. No reason exists to cling to such an outmoded rule which causes useless and complicated litigation.

Linkletter v. Walker, 381 U.S. 618, and *Terry v. Ohio,* .... U.S. ...., 20 L. Ed. 2d 889, signal the advent and general adoption of the "judicial integrity" and "police deterrent" theories of the exclusionary rule which simply cannot logically co-exist with *any* form of a standing requirement, such as that described in the opinion below.

In a decision joined in by eight members of the Court the following statements were made:

> "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct.

. . . "Thus, its major thrust is a deterrent one, see *Linkletter v. Walker,* 381 U.S. 618, 629-635, 14 L. Ed. 2d 601, 608-612, 85 S. Ct. 1731 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words' ".

. . . "The rule also serves another vital function— . . . the imperative of judicial integrity."

"Courts which sit under our Constitution can not and will not be made parties to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions, thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. *A rule admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence,* while the application of the exclusionary rule withholds the constitutional imprimatur." (emphasis added)

"When such conduct [illegal search] is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."

Terry v. Ohio, ... U.S. ...., 20 L. Ed. 2d 889, 900-902; See also

Lee v. Florida, ... U.S. ...., 20 L. Ed. 2d 1166, 1173.

Adoption of the police deterrent theory gives meaning to the original purpose behind the Fourth Amendment:

> "[It] is general and forbids every search that is unreasonable; it protects all . . . It emphasizes the purpose to protect against all general searches . . . [and] is to be liberally construed." *Go-Bart Importing Co. v. United States,* 282 U.S. 344.
>
> "*Linkletter* and its progeny (*Terry* . . .) add up to the conclusion that the court is now operating under a general deterrence theory of the exclusionary rule. Since the *Jones-Wong Sun* standing doctrine has never been examined under this theory, a reappraisal of its current validity is in order." Comment, *Standing to Object,* 34 U. Chi. L. Rev. 342, 356.

With such strong and unequivocal statements as were made in *Terry,* the only non-conflicting and logical approach possible is the one which allows any person to object to the introduction of iliegally seized evidence or its fruits.

Mancusi v. DeForte, extended the privacy theory almost to capacity and as a result Justice Black in his dissent felt that the court was preparing the way to eliminate the standing requirement. *Mancusi v. DeForte,* .... U.S. ...., 20 L. Ed. 2d 1154.

To say that the Government after illegally searching A, can eliminate the taint on the evidence merely by choosing not to prosecute A and instead choosing to prosecute B, is to say that we have now allowed form and procedure to become superior to justice and logic.

Such a situation is a clear violation of the equal protection clause and provides no real protection against "arbitrary convictions".[7]

An example of a case wherein the U.S. Attorney declined to prosecute A so that he could convict B is *Darden v. United States,* Court of Appeals for the Ninth Circuit, No. 22,765,[8] now awaiting decision by the Ninth Circuit Court of Appeals. In that case Sadie Mae Roberts and appellant Darden crossed the border from Mexico into the United States and soon after crossing, Sadie Mae Roberts' vagina was illegally searched, heroin being found therein. She was indicted along with appellant but not thereafter prosecuted. Upon appellants trial, the evidence was not suppressed and he was convicted. A petition for certiorari will be made in the *Darden* case also, because the Ninth Circuit, feeling bound by the standing rule, will likely affirm. Such basically unfair cases caused by the irresponsible tactics of various prosecuting agencies, exist in hundreds of courts, federal and state, all across the country.

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[7]To allow such a rule to exist is almost to revive the old "silver platter doctrine" allowing use by the federal government of evidence illegally seized by the state. *Burdeau v. McDowell,* 256 U.S. 465; *Elkins v. United States,* 364 U.S. 206. The standing rule is unfair, causes needless litigation, and should be changed.

[8]During oral argument on October 31, 1968, Judge Walter Ely stated to counsel for appellant that the arguments about standing seemed logical but that the Supreme Court and not the Ninth Circuit should decide the issue.

II.

Certiorari should be granted because the decision below conflicts with the decision of the California Supreme Court in *People v. Martin,* 45 Cal. 2d 755, wherein Justice Traynor clearly pointed out the illogical results produced by maintaining the standing requirement. In the majority opinion at page 760, he said:

> ". . . [T]he courts under the old [standing] rule have been constantly required to participate in, and in effect condone the lawless activity of law enforcement officers. . . . If law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them. . . . Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights."

The State of California with commendable foresight voluntarily began applying the exclusionary rule[9] prior to *Mapp v. Ohio*[10] and now clearly believes in the fundamental fairness of the exclusionary rule without a standing requirement. In order to eliminate needless and

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[9]*People v. Cahan*, 44 Cal. 2d 434.
[10]*Mapp v. Ohio*, 367 U.S. 643.

illogical conflict between the federal rule and the California rule a revision should be considered.

The question of standing is one which arises in thousands of cases, both federal and state, affecting many individuals in every court day, and thus is an issue deserving of Supreme Court attention. Standing has been disfigured almost to the point of non-recognition by many exceptions and basic fairness has been ignored by the lower courts in maintaining and applying the rule. The rule is long overdue for re-examination and possible elimination.

The Decision Below Failed to Consider Wong Sun and Its Application to the Incriminating Statements Introduced Into Evidence.

I.

With regard to petitioner's oral statements to investigators, the Ninth Circuit opinion below conflicts with *Wong Sun v. United States,* 371 U.S. 471, which, through error or oversight does not seem to have been considered. Petitioner was confronted on October 11, 1961, (two days after the first search) with certain checks and records obtained in the search, and as a result petitioner stated that he had reported these sums on his federal return but not on his state return [Clk. Tr. 12, Rep. Tr. 61-65 and 163-167].

Clearly, the interrogation and confrontation were tied closely to the investigation of Barkley and petitioner, and whether or not he had standing on the original search, the use of the illegally seized evidence for confrontation purposes becomes *a direct exploitation of the illegal search. Wong Sun v. United States,* 371 U.S.

471, 488. Such an issue is a familiar one; it arises frequently in other cases and is of nationwide importance.

II.

The decision below appears to be incorrect and in conflict with the principle of *Collins v. Beto,* 348 F. 2d 823, a Fifth Circuit case holding that after an illegal arrest the police must advise of the right to counsel if they hope to use statements. If such is true, advisement of the right to counsel pursuant to *Escobedo v. Illinois,* 378 U.S. 478, should be necessary also when illegal evidence is used as a lever to obtain statements.[11]

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted. If certiorari is granted in *McGarry v. United States,* Docket Number 37, it should also be granted in this case and either held pending that decision or heard at the same time.

Respectfully submitted,

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[11]Since its standards are not retroactive, petitioner does not argue that *Miranda v. Arizona,* 384 U.S. 436, is applicable.

APPENDIX A.

Statutes and Constitution of the United States of America.

1. 26 United States Code Section 7206(1):

"Any person who —(1) willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every matter; . . . shall be guilty of a felony. . . ."

2. FOURTH AMENDMENT TO THE CONSTITUTION:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, thall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. SIXTH AMENDMENT TO THE CONSTITUTION:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

4. FOURTEENTH AMENDMENT TO THE CONSTITUTION:

". . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

William Lyle Boyle, *Appellant,* vs. United States of America, *Appellee.* No. 21,687.

[May 17, 1968]

Appeal from the United States District Court for the Central District of California.

Before: ELY and CARTER, Circuit Judges, and CARR, District Judge.

ELY, Circuit Judge:

In an indictment containing four counts, appellant was charged with having willfully filed false federal income tax returns for the years 1959 and 1960 and with having filed false amended returns for the same years. 26 U.S.C. § 7206(1). In a jury trial, he was found guilty of all four offenses with which he was charged. His motion for new trial was denied, and he appeals.

The appellant does not claim that the evidence was insufficient to support conviction. He bases his appeal on two grounds: (1) That certain evidence was illegally seized and for that reason should not have been admitted against him and (2) that testimony of certain oral statements made by him to investigating officers should have been barred because of the failure of the officers to give him required warnings.

Appellant occupied the position of manager of the Midway City (California) Sanitation District. One

Edwin L. Barkley had performed services for the District. Barkley conducted his business through Barkley Pipeline Company and Mesa Pipe Line and Supply, Inc., and authorities believed that Barkley, by falsifying billing records and accounts, had overcharged the Sanitation District for the services which Barkley's business concerns had rendered. The investigating authorities, state officers representing the District Attorney of Orange County, California, procured three search warrants. They authorized searches to be made of premises which were owned and controlled by Barkley. The appellant did not occupy such premises and had no interest in them. Under the authority of the warrants, claimed by appellant to have been defective, there was a seizure of certain canceled checks. Although the record is not entirely clear, at least some of these checks were offered into evidence by the Government and received over appellant's objection. Three of them, the Government's Exhibits 9, 10 and 11, were drawn on the account of "Barkley Pipeline Construction, Incorporated, Edwin L. Barkley," and were payable to the appellant as a "Licensed Land Surveyor." Two of the three were dated in January 1960, and the other in December 1959. The appellant had not worked as a surveyor since 1952. Through the testimony of the operations officer of a certain bank, the Government proved that Barkley had purchased eight cashier's checks in 1959 and 1960. one payable to "W. Lyle Boyle," another to "W. Lyle Boyle, Surveyor," another to "Boyle Surveying," a fourth to "Boyle Survey," and the remaining four to "Boyle Survey Service." They ranged in amounts from $211 to $2,000. Appellant had submitted no bills for services, but Barkley had instructed his own

bookkeeper to charge the amounts of the checks to a bidding and estimating expense account. The prosecution's case rested essentially upon appellant's failure to have reported, as income, $9,975.47 which he received from Barkley in 1959 and $9,472.07 which he received from Barkley in 1960.

Two of the District Attorney's representatives, following up their suspicion of theft by Barkley, visited the appellant at his place of employment in October 1961. During the interview, which occurred in the room of the Board of Directors of the Sanitation District, the appellant stated, in effect, that he was reasonably certain that he had declared the payments from Barkley in his federal income tax returns, but had probably forgotten to report them in his California state income tax returns. Testimony that he had so stated was admitted, over objection, as impeachment of appellant's trial testimony that the payments from Barkley represented loans and not income.

Before he was indicted by the federal grand jury, appellant, along with Barkley, had been charged and tried in a criminal action in the California courts. In that action, appellant's motion to suppress the documentary evidence which had been seized by the state officers pursuant to the search warrants was granted by the state court, and the state charges against him were dismissed.

On the first issue before us, we hold that the District Court properly received the incriminating canceled checks into evidence. That the state court suppressed the evidence is not controlling.

> "In determining whether there has been an unreasonable search and seizure by state officers, a fed-

> eral court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."

Elkins v. United States, 364 U.S. 206, 223-24, 4 L. Ed. 2d 1669, 80 Sup. Ct. 1437 (1960). Our "Independent inquiry" terminates with the answer to a preliminary question, whether or not the appellant was, under Fed. R. Crim. P. 41(e), a "person aggrieved" so that he had the necessary standing to present his motions to suppress. "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search oc seizure directed at someone else.*" *Jones v. United States,* 362 U.S. 257, 261, 4 L. Ed. 2d 697, 80 Sup. Ct. 725 (1960). (emphasis added). Here, it is very clear that the search and seizure were directed at Barkley, "someone else," and not at appellant. The premises which were searched were controlled by Barkley, and no right of privacy guaranteed to appellant was infringed by the intrusion. The appellant's counsel, with commendable ingenuity, attempts to endow appellant with standing by contending that appellant, as payee, had a proprietary interest in the checks which he had endorsed and cashed. Conceding that he may have had a proprietary interest in the beginning, the checks, once paid and canceled, became nothing more than records belonging exclusively

to the maker to whom they had been returned. See *Hill v. United States,* 374 F.2d 871 (9th Cir.), *cert. denied,* 389 U.S. 942 (1967).

We also reject appellant's argument that the testimony of his oral declarations to the investigating officers should have been excluded upon the authority of *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 Sup. Ct. 1758 (1964). The appellant concedes that *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602 (1966), decided after the commencement of his trial, is inapplicable. In *Escobedo,* the accused was denied his requested access to counsel. Here, there is no evidence that appellant did, at any time during his interview with the officers, request permission to consult with counsel. Moreover, it is not clear that the suspicion of the officers had "focused" upon the appellant when he made the statement in question. There is justification for the implied determination that it was the conduct of Barkley alone which was under investigation at the time and that the suspicion of the officers was focused solely upon him. Finally, the principle of *Escobedo* applies to the benefit of one who "has been taken into police custody." 378 U.S. at 490-91. It is true that in *Miranda* the concept of custody was expanded so as to embrace situations wherein the movement of a suspect is restricted in a significant way by the presence of civil authority. 384 U.S. at 444. Here, however, there is absolutely no indication that the appellant's freedom of movement, at the time of the interview, was restricted in any manner whatsoever.

Affirmed.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

William Lyle Boyle, Appellant, vs. United States of America, Appellee. No. 21687.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 17, 1968.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 822

WILLIAM LYLE BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. App. B) is reported at 395 F. 2d 413.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1968. (Pet. App. B, p. 7.) Rehearing was denied on October 10, 1968. (IR. 140.)[1] On No-

[1] "R." refers to the three-volume record on file with this Court.

vember 11, 1968, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including December 9, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had standing to object to the introduction of evidence at a federal trial on the ground that the constitutional rights of a third person were violated when the evidence was originally seized by state officers, or on the ground that the evidence had been suppressed in a prior state trial where petitioner and the third person were co-defendants.

2. Whether oral statements made by petitioner to state investigators should have been excluded on the ground that the statements were the product of exploitation of evidence seized by them in violation of the constitutional rights of a third person.

STATEMENT

After a jury trial, petitioner was convicted of wilfully filing false federal income tax returns for the years 1959 and 1960, in violation of Section 7206(1) of the Internal Revenue Code of 1954. The substance of the government's proof was that petitioner had received $9,975.47 from Edwin L. Barkley in 1959 and $9,472.07 from him in 1960 and had not reported this income on his tax returns.

1. Petitioner was the manager of the Midway City (California) Sanitation District, and Barkley ren-

dered services to the District through the Barkley Pipeline Company and Mesa Pipe Line and Supply, Inc. As the result of suspicion by state authorities that Barkley, by falsifying billing records and accounts, had overcharged the Sanitation District for services which these concerns had rendered, state investigators obtained three search warrants [2] authorizing searches to be made of premises which were owned and controlled by Barkley. Pursuant to these warrants, the state officers seized certain canceled checks, at least some of which were received at trial over petitioner's objection (Pet. App. B, pp. 2-3).

Before the present federal income tax charges were brought, petitioner and Barkley were brought to trial for state offenses. But after the California state court sustained an objection to the use of evidence obtained under the above-mentioned search warrants, on the ground that the documents had not been described with sufficient particularity, the state dropped the charges (Pet. App. B, p. 4; IR. 31-33.)

2. When the federal grand jury returned the indictment in this case, petitioner filed a pre-trial motion to suppress all evidence derived from the searches of Barkley's premises (IR. 8-9), supported by an affidavit (IR. 10-13) in which he asserted his belief that Internal Revenue agents had obtained from the

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[2] The affidavit (IR. 18-19) in support of the first warrant asserted that the affiant officer's investigation had disclosed various facts (which he particularized) which had led him to believe that Barkley had committed theft by overcharging for services, and stated, *inter alia*, that the affiant had seen a cashier's check from Barkley, payable to petitioner.

Orange County district attorney the originals or copies of Barkley's seized documents. In further support of his motion, petitioner filed an affidavit by attorney Albeck (IR. 31-33), stating that the state court had sustained Albeck's objection to the seized evidence and had suppressed it, that the district attorney agreed in open court to return all the seized records, papers, and documents, and did so, with the exception of four checks [3] which he had been unable to return because they were in the custody of the clerk of the state court as exhibits.[4]

The district court denied petitioner's motion to suppress (IR. 123), but the record does not show whether the district court rendered any opinion or made any findings of fact or heard any evidence.

3. At trial, the Government introduced in evidence, through the testimony of a bank officer, photostatic copies of three canceled checks (Govt. Exs. 9, 10, and 11) drawn by Barkley on his business accounts and payable to petitioner, as well as numerous cashier's checks purchased by Barkley and made payable to petitioner (IIR. 22-32; Pet. App. B, p. 3). It was shown that petitioner cashed these checks (IIR. 34-47). After petitioner testified that these checks represented loans from Barkley (IIR. 74-98), an investigator for the Orange County district attorney testified in rebuttal that, during his investigation, petitioner had asserted

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[3] The affidavit describes these checks, and it is clear that photostatic copies of at least three of them were introduced at the trial below. (IIR. 27-30.)

[4] The state court ordered the clerk to return these documents to counsel (IR. 36-42).

that the payments were for services rendered and that he was quite sure that he had declared them on his federal tax return, although he probably had forgotten to include them on his state tax return. (IIR. 60-68; IIIR. 163-167; Pet. App. B, p. 4.) The jury returned a verdict of guilty on all counts.

On appeal, the court below held that petitioner lacked standing to raise the search and seizure point and that the oral statements were admissible under any constitutional test (Pet. App. B, pp. 4-6).

ARGUMENT

1(a). The court below properly found petitioner without standing to object to the use in evidence of the checks (or copies) seized from Barkley. Petitioner's contention that the decision below "conflicts with the principles established" (Pet. 9) in *Jones* v. *United States*, 362 U.S. 257, *Bumper* v. *North Carolina*, 391 U.S. 543, and *Mancusi* v. *DeForte*, 392 U.S. 364, is not correct. The latter two cases, as well as *Wong Sun* v. *United States*, 371 U.S. 471 (cited at Pet. 11), simply applied the principle of *Jones* v. *United States*, *supra*, where this court rejected common law property concepts as foreign to the purpose of the Fourth Amendment, and held that the petitioner, because he was rightfully present in the invaded apartment, belonged "to the class for whose sake the constitutional protection is given" (362 U.S., p. 261).[5] In the present case,

[5] In *Bumper* v. *North Carolina*, *supra*, the petitioner's grandmother owned the house but he lived there. In *Mancusi* v. *DeForte*, *supra*, union records of which the petitioner had custody were seized from the union office which he shared with other union officials.

petitioner had no interest whatever in Barkley's premises or in Barkley's seized checks and records (Pet. App. B, pp. 5-6), and makes no claim to having been present when the search occurred or at any other time. He therefore cannot claim that *his* right of privacy was invaded by official misconduct. Compare *Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368-369.

Petitioner further contends (Pet. 7-9) that the refusal to find standing in this case conflicts with *McDonald* v. *United States*, 335 U.S. 451. That case involved a joint trial founded on evidence determined to have been illegally seized from a room rented by one defendant while both were present. The Court merely ruled that since the evidence should have been returned on motion of the tenant, it should not have been available for use against the guest either. Here, on the contrary, as we shall discuss more fully *infra*, the original documents seized from Barkley *were* all returned to Barkley, but the copies made while the originals were in the hands of the district attorney were properly not affected by the state court's order. Nor can it be said here, as in *McDonald*, that either the state court or the district court committed a trial error which prejudiced petitioner. The state court *granted* Barkley's motion, and thus sufficiently protected his constitutional rights. But that court was not obliged to preclude the use of those items in a subsequent federal case, against a different defendant, when under *Elkins* v. *United States*, 364 U.S. 206, the federal court must determine admissibility *de novo*. Nor, since *petitioner's* constitutional rights were not violated by the seizure of Barkley's checks, did the

district court err in refusing to suppress this evidence. Finally, no reason appears for extending the rule of *McDonald* to a case where there was no *joint* trial. Both *McDonald* and all the court of appeals decisions cited by petitioner (Pet. 8) involved joint trials.

(b). Petitioner also asserts (Pet. 6) that "Illegal retention of the evidence by the District Attorney after the court ordered it returned * * * constituted a separate and distinct unreasonable seizure in violation of the Fourth Amendment." Although he concedes (Pet. 6) that he has found no cases based on similar facts, the short answer to his contention is that this record does not present such a situation either. There is no basis for an argument that the California district attorney retained any copies of material seized from Barkley, or that the state court made any order with respect to copies. The only state court order in the record (IR. 36) makes no reference to copies. Petitioner states (Pet. 4) that "some of the evidence was retained by the District Attorney", but gives no record reference to support his assertion, except to refer to his own suspicion that the district attorney had retained some of the checks (IR. 13). Even if the district attorney had made and retained copies of the checks he could not have been required to turn them over to Barkley; Barkley's constitutional interests were vindicated by the order to return the originals and by suppression of the use of the evidence or its fruits against him. See *Warden* v. *Hayden*, 387 U.S. 294, 305; *Meister* v. *United States*, 397 F. 2d 268 (C.A. 3). Furthermore, as the court below explained, quoting this Court's opinion in *Elkins* v. *United*

States, 364 U.S. 206, 223-224 (Pet. App. B, pp. 4-5), the use of evidence in a federal court is controlled by the federal law as to search and seizure, irrespective of whether a state court has previously allowed *or forbidden* the use of the same evidence.

In any event, petitioner failed to present this issue of illegal retention to the district court (IR. 43-54) or in his briefs in the court of appeals, and such failure is, in the absence of "exceptional circumstances", fatal to its presentation for the first time to this Court. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Husty* v. *United States*, 282 U.S. 694, 701-702.

2. Petitioner contends (Pet. 17-18) that his oral statements to state investigators should have been excluded because in questioning him the officers confronted him with the checks seized at Barkley's premises. This contention adds nothing to the contentions already considered, since if, as we submit, petitioner lacked standing to require the exclusion, at the trial below, of the various checks here involved, he obviously could have no greater right to complain that the checks were utilized while he was under investigation. Furthermore, petitioner did not present this issue to the court of appeals, but in his briefs contended only that he was not given required warnings. (Pet. App. B, pp. 2, 6.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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